NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

ORNI 8, LLC, and ORPUNA, LLC d/b/a Puna Geothermal Venture *and* International Brotherhood of Electrical Workers, Local 1260. Case 20–CA– 096143

March 26, 2013 DECISION AND ORDER

By Chairman Pearce and Members Griffin and Block

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by the Union on January 10, 2013, the Acting General Counsel issued the complaint on January 17, 2013, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain and to furnish relevant and necessary information following the Union's certification in Case 20–RC–078220. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g). Frontier Hotel, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On February 8, 2013, the Acting General Counsel filed a Motion for Summary Judgment and Brief in Support of Motion. On February 13, 2013, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain and to provide information, but contests the validity of the certification on the basis of the issues raised in the representation proceeding, including its assertion that the President's recess appointments to the Board are constitutionally invalid, and that the Board lacks authority to act. We reject this argument. ¹

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

We also find that there are no factual issues warranting a hearing with respect to the Union's request for information. The complaint alleges, and the Respondent admits, that by letter dated December 26, 2012, the Union requested that the Respondent provide it with "a copy of [the Respondent's] benefit and wage structure." It is well established that information concerning the terms and conditions of employment of unit employees is presumptively relevant for purposes of collective bargaining and must be furnished on request. See, e.g., Metro Health Foundation, Inc., 338 NLRB 802 (2003). The Respondent has not asserted any basis for rebutting the presumptive relevance of the information. Rather, the Respondent raises as an affirmative defense its contention, rejected above, that the Union was improperly certified. We find that the Respondent unlawfully refused to furnish the information sought by the Union.

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a general partnership with an office and place of business in Pahoa, Hawaii, has been engaged in the business of generating and providing electrical power. At all material times, the Respondent has been owned jointly by ORNI 8, LLC, and ORPUNA, LLC, as general partners doing business as Puna Geothermal Venture.² In conducting its operations described above, the Respondent provided services valued in excess of \$50,000 for Hawaii Light and Electric Company, an enterprise that meets the Board's jurisdictional standards on a direct basis.³

¹ We recognize that the United States Court of Appeals for the District of Columbia Circuit has concluded that the President's recess appointments were not valid. See *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). However, as the court itself acknowledged, its decision conflicts with rulings of at least three other courts of appeals. See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). This question remains in

litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act.

² The Acting General Counsel, the Union, and the Respondent have stipulated to the above facts, which correct the allegations in par. 2 of the complaint.

³ Par. 3 of the complaint alleges that the Respondent is an employer engaged in commerce. In its answer, the Respondent denies this allegation. However, the Respondent stipulated that it is such an employer in

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, International Brotherhood of Electrical Workers, Local 1260, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on May 14, 2012, the Union was certified on December 14, 2012, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

Included: All full-time and regular part-time operations and maintenance employees. Excluded: All other employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive collectivebargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

By letter dated December 26, 2012, the Union requested that the Respondent meet and bargain with it as the exclusive collective-bargaining representative of the unit and requested information regarding the unit's terms and conditions of employment. By letter dated January 7, 2013, the Respondent refused to recognize the Union as the exclusive collective-bargaining representative of the unit, bargain with the Union in good faith, and provide information requested by the Union regarding the unit's terms and conditions of employment.

We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since January 7, 2013, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, and by failing to provide the Union with requested information regarding the terms and conditions of employees in the unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and

the parties' stipulated election agreement. Accordingly, the Respondent's denial with respect to this allegation does not raise any material fact to be litigated at a hearing.

desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. We also shall order the Respondent to furnish the Union the information requested.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord: *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, ORNI 8, LLC, and ORPUNA, LLC d/b/a Puna Geothermal Venture, Pahoa, Hawaii, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Failing and refusing to recognize and bargain with International Brotherhood of Electrical Workers, Local 1260 as the exclusive collective-bargaining representative of the employees in the bargaining unit.
- (b) Failing and refusing to provide the Union with requested information that is necessary to its role as the exclusive collective-bargaining representative of the unit employees.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

Included: All full-time and regular part-time operations and maintenance employees. Excluded: All other employees, guards and supervisors as defined in the Act.

- (b) Provide the Union with the information requested in its letter of December 26, 2012.
- (c) Within 14 days after service by the Region, post at its facility in Pahoa, Hawaii, copies of the attached notice marked "Appendix." Copies of the notice, on forms

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In additional to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since about January 7, 2013.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 26, 2013

Mark Gaston Pearce,		Chairman	
Richard F. Griffin, Jr.,		Member	
Sharon Block,		Member	
(SEAL)	NATIONAL LABO	LABOR RELATIONS BOARD	

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Brotherhood of Electrical Workers, Local 1260 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT refuse to furnish the Union with requested information that is necessary to its role as the exclusive collective-bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

Included: All full-time and regular part-time operations and maintenance employees. Excluded: All other employees, guards and supervisors as defined in the Act.

WE WILL provide the Union with the information that it requested in its letter of December 26, 2012.

ORNI 8, LLC, AND ORPUNA, LLC D/B/A PUNA GEOTHERMAL VENTURE